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In the Supreme Court of the United States

OCTOBER TERM, 1991

CARL WILLNER, PETITIONER

v.

WILLIAM P. BARR,
ACTING ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Department of Justice, consistently with the Fourth Amendment, may require a drug test of applicants tentatively selected for an attorney position.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-448

CARL WILLNER, PETITIONER

v.

WILLIAM P. BARR,
ACTING ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-30a, is reported at 928 F.2d 1185. The orders of the court of appeals denying petitioner's petition for rehearing and suggestion for rehearing en banc, Pet. App. 31a-33a, are unreported. The opinion of the district court, Pet. App. 36a-47a, is reported at 738 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1991. A petition for rehearing was denied on July 5, 1991. Pet. App. 31a-33a. The petition for a writ of certiorari was filed on September

12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1986, the President issued an Executive Order directing federal agencies to adopt programs for ensuring a drug-free federal workplace. Exec. Order No. 12,564, 3 C.F.R. 224 (1987); Pet. App. 49a. Each program was to include provision for drug testing employees. Exec. Order No. 12,564, § 2(b)(5). The Order distinguished between the testing of incumbent federal employees and applicants. In the case of incumbents, testing was limited to "sensitive positions," unless there was reasonable suspicion of illegal drug use, or the testing pertained to an accident or unsafe practice or followed drug counseling or rehabilitation. Exec. Order No. 12,564, § 3(a) and (c); Pet. App. 51a-52a. For applicants there was no such restriction; the Executive Order authorized agencies to test "any" applicant. *Id.* § 3(d); Pet. App. 52a.

In the Executive Order, the President made several findings as to the adverse effects of drug use on the government workplace. Some of these findings pertain principally to employees in sensitive positions: for example, that the use of drugs "can pose a serious health and safety threat to members of the public and to other Federal employees," and that drug use by Federal employees "in certain positions" creates the possibility of undue influence posing a "serious risk to national security, the public safety, and the effective enforcement of the law." Pet. App. 50a. Other findings in the Executive Order pertain to the effects of drug use on all federal employees, regardless of whether they occupy sensitive positions: *i.e.*, that drug-using employees "tend to be less produc-

tive, less reliable, and prone to greater absenteeism"; and that drug use by federal employees "undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively." Pet. App. 49a, 50a.

In adopting a drug testing plan pursuant to the Executive Order for the Department of Justice (DOJ), the Attorney General stated that, due to DOJ's law enforcement responsibilities and the sensitive nature of its work, DOJ has "an especially compelling obligation to eliminate illegal drug use from its workplace. Employees who work for an agency whose mission is to uphold and enforce the law, should not themselves violate the law." Pet. App. 60a. In this regard, the DOJ plan cites the "high public trust" placed in Department attorneys, "requiring them, as a condition of employment and as a measure of their position sensitivity, to pass full-field FBI background investigations before permanent offers of employment are extended." Pet. App. 61a. The plan also cites "the need to maintain employee productivity." *Id.* at 60a.

The DOJ plan, like the Executive Order, distinguishes between the testing of incumbent employees and applicants. The DOJ plan requires testing for all applicants who are tentatively selected for employment. Pet. App. 77a, 93a-94a, 100a. By contrast, the testing of incumbents is limited to "sensitive" positions, unless there is reasonable suspicion or the testing is incident to an accident or unsafe practice, or follows drug counseling or rehabilitation. *Id.* at 98a, 101a-102a. Like the testing of incumbent employees, the testing of applicants is subject to the procedures spelled out in guidelines issued by the Department of Health and Human Services. Pet. App. 81a. These procedures include: (1) a requirement

that the individual be allowed privacy unless there is reason to believe that the individual may alter or substitute the specimen, (2) a requirement that each sample be tested twice according to different testing techniques before being pronounced positive; (3) a requirement to use testing laboratories that are certified by HHS and are continuously monitored through a blind sample testing program that triggers special procedures if any false positives are reported; and (4) review of all test results by a medical review officer, who evaluates whether the result has a legitimate explanation (such as prescription medication). HHS Guidelines, 53 Fed. Reg. 11,970, 11,979 (1988), §§ 2.2(e), 2.4(e), 2.5, 2.7, and Subpart C. The procedures followed by DOJ are the same ones that this Court approved in *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 661-662, 672 n.2 (1989), with one exception that is more favorable to applicants than the *Von Raab* procedure.[1]

2. Petitioner is a lawyer who was accepted for a position in the Antitrust Division of the Justice Department subject to the requirement of passing a drug test. He sought a waiver of the test, but was informed that waivers were not available. He then brought this action, seeking a declaratory judgment and injunction. Pet. App. 37a.

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[1] The one exception pertains to privacy protection in collection of the sample. In the procedure approved in *Von Raab*, the person monitoring sample collection "remains close at hand to listen for the normal sounds of urination," as a precaution against substitution of the sample. *Von Raab*, 489 U.S. at 661. The DOJ procedure is different: "After the individual is escorted to the enclosure, the collection monitor returns to the waiting room to receive the specimen from the individual." Pet. App. 7a-8a.

The district court held that requiring petitioner to submit to a drug test violates the Fourth Amendment. The court reasoned that under *Harmon* v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), cert. denied, 493 U.S. 1056 (1990), the government may conduct suspicionless drug testing of incumbent employees only if their position requires a security clearance, directly involves public safety, or directly involves aspects of drug enforcement. Pet. App. 38a. The court saw no difference between incumbent employees and applicants in this regard. *Id.* at 41a.

3. The court of appeals, by a divided vote, reversed. Pet. App. 1a-18a. Applying the balancing test set forth in *Von Raab* and *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), the court held that the DOJ drug testing program is "reasonable" under the Fourth Amendment.

On the applicant's side of the balance, the court found that the DOJ applicant drug testing program involves "a comparatively slight" and lesser intrusion on privacy than other such programs since (unless there is reason to suspect tampering) the applicant is not visually observed or auditorily monitored while providing a urine sample. Pet. App. 7a-8a. In addition, the only medical fact revealed by the DOJ drug testing program is whether the applicant has recently used illegal drugs, and the applicant must reveal just that fact to the government as part of the FBI background investigation that all applicants must undergo. *Id.* at 8a. Moreover, an applicant is aware of the testing requirement, and he receives 48 hours' advance notice of the actual testing date, which "reduces 'to a minimum' the unsettling effect of unexpected intrusions." *Id.* at 9a (quoting *Von Raab*, 489 U.S. at 672 n.2). Any applicant who finds

testing distasteful may withdraw his application, which is a lesser burden than faced by incumbent employees, who must resign if they object to drug testing. Pet. App. 9a-10a. And finally, the court observed that the practice of testing applicants for drug use is widely followed in the private sector, and determined that the employment practices followed by private employers are relevant to the issue of "what expectation of privacy 'society is prepared to accept as "reasonable" ' when the government engages in the hiring process." *Id.* at 14a (quoting *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

On the governmental interest side of the balance, the court pointed out that drug use among DOJ employees would undermine the Department's "credibility as the nation's leading law enforcement agency," Pet. App. 14a; that the hiring process "is designed to gather information so that a judgment may be made regarding the individual's suitability for employment," *ibid.*; and that recent studies confirmed "an extremely high correlation between a positive result in a pre-employment drug test and subsequent employment problems," *id.* at 15a-16a. The court noted that suspicionless drug testing may not be justified as a means of detecting drug-related employment problems for incumbent employees, because they can be directly observed and tested on a reasonable-suspicion basis. *Id.* at 16a. But an applicant is "an outsider" whom the government "has had no opportunity to observe in the setting of the workplace." *Ibid.*

Judge Henderson dissented. Pet. App. 18a-30a. She concluded that suspicionless drug testing of incumbent employees is permissible only when the job

involves special safety or security considerations, and that this rule should be applied to applicants. *Id.* at 19a-22a. She found that the Department's interest in maintaining the integrity of its lawyers is insufficient to justify applicant drug testing, because that justification was insufficient in the case of incumbents. *Id.* at 22a-23a. She also concluded that applicant drug testing had little utility, since the FBI background investigation supplies the Department with significant information from which it can evaluate an applicant's likely drug use. *Id.* at 24a-26a. Finally, she deemed irrelevant to an applicant's privacy interests advance notice of testing and the practices followed in private industry. *Id.* at 26a-28a.

4. Rehearing en banc was denied, six judges dissenting. Pet. App. 32a-33a.

ARGUMENT

Petitioner argues that the DOJ drug testing plan for attorney-applicants violates the Fourth Amendment. That contention does not warrant review by this Court, for several reasons.

1. There is no conflict among the circuits on the question presented by petitioner. Since *Von Raab* and *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), the courts of appeals have considered the constitutionality of drug testing of incumbent employees in various contexts.[2] Those courts have ruled that suspicionless drug testing of incumbent employees is "reasonable" only if the job at issue involves special considerations relating to security,[3]

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[2] In fact, *Von Raab* itself involved incumbent employees who were tested as a condition of promotion or transfer.

[3] *Hartness* v. *Bush*, 919 F.2d 170 (D.C. Cir. 1990) (secret-level security clearances), cert. denied, 111 S. Ct. 2890

safety [4] or integrity.[5] This case, by contrast, is the first circuit court decision applying the *Von Raab* balancing test to an applicant where the job at issue does not involve one of those factors, and there are material differences between the circumstances of an applicant and an incumbent, as the court below explained.[6] In the absence of a conflict among the cir-

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(1991); *Harmon* v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (top secret-level clearances), cert. denied, 493 U.S. 1056 (1990); *National Federation of Federal Employees* v. *Cheney*, 884 F.2d 603, 612 (D.C. Cir. 1989) (guards at high-security military installations), cert. denied, 493 U.S. 1056 (1990); *Taylor* v. *O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (prison guards in direct contact with inmates).

[4] *International Brotherhood of Teamsters* v. *DOT*, 932 F.2d 1292 (9th Cir. 1991) (drivers of large interstate trucks); *Bluestein* v. *Skinner*, 908 F.2d 451 (9th Cir. 1990) (air traffic controllers, airline flight crews, and mechanics), cert. denied, 111 S. Ct. 954 (1991); *International Bhd. of Electrical Workers, Local 1245* v. *Skinner*, 913 F.2d 1454 (9th Cir. 1990) (natural gas pipeline workers); *Transport Workers' Union* v. *Southeastern Pennsylvania Transp. Auth.*, 884 F.2d 709 (3d Cir. 1989) (public transit workers in safety-sensitive positions).

[5] *National Federation of Federal Employees* v. *Cheney*, 884 F.2d at 614 (drug counsellors); *Policeman's Benevolent Ass'n* v. *Washington Tp.*, 850 F.2d 133 (3d Cir. 1988) (police officers), cert. denied, 490 U.S. 1004 (1989).

[6] Every district court other than the one in this case that has addressed the constitutionality of applicant drug testing has held that practice lawful, even if incumbents could not be tested. *American Postal Workers Union* v. *Frank*, 734 F. Supp. 40 (D. Mass. 1990), appeal pending, No. 91-1633 (1st Cir.); *Transportation Inst.* v. *United States Coast Guard*, 727 F. Supp. 648, 654-655 (D.D.C. 1989); *Owners-Operators Independent Drivers Ass'n* v. *Burnley*, 705 F. Supp. 481, 487 (N.D. Cal. 1989), rev'd on other grounds, 931 F.2d 582 (9th Cir. 1991); *McDonnell* v. *Hunter*, 612 F. Supp. 1122, 1130

cuits, there is no need for review of the decision below.[7]

Petitioner claims that review is warranted since the decision below will establish the governing rule for all applicants for federal employment. Pet. 19-21. Two factors, however, limit the reach of this case. The first is that every DOJ lawyer is subject to what the court of appeals correctly described as a "thorough and exhaustive" and "extraordinarily intrusive" background investigation by the FBI before he can be appointed to his job. Pet. App. 10a, 12a. The vast majority of federal employees undergo a far less extensive investigation.[8] The second fact is that

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n.6 (S.D. Iowa), modified on other grounds, 809 F.2d 1302 (8th Cir. 1987).

Petitioner cites *International Bhd. of Teamsters* v. *DOT*, 932 F.2d 1292, 1307 (9th Cir. 1991), which sustained a Department of Transportation rule requiring pre-employment testing of interstate commercial truck drivers. Pet. 15 n.7. There, however, the jobs involved were safety sensitive, and it was on that basis that the court upheld testing incumbent employees. *Teamsters* thus did not present the question in this case, although the court did note that applicant testing is less intrusive than incumbent testing. 932 F.2d at 1307 ("The level of intrusion, furthermore, is less than that encountered in random testing. No element of surprise is involved. The test is triggered by the job applicant's own voluntary conduct, and will occur only once in the applicant's career.").

[7] Another case, involving the Postal Service, is presently pending in the First Circuit. *American Postal Workers Union* v. *Frank*, *supra*. That case, however, also involves a standing issue, which must be resolved before the merits can be considered.

[8] Such applicants undergo the "National Agency Check and Written Inquiries" (NACI). A NACI is conducted by the Office of Personnel Management (OPM) and involves checking the fingerprint and investigative files of the FBI, OPM,

DOJ is the nation's principal law enforcement agency, and thus has a unique concern with avoiding the appearance of drug use by its lawyers. *Id.* at 14a. The court below relied heavily on those facts, and neither one is generally applicable to employees in other federal agencies. The decision below is therefore far more limited than petitioner claims.

2. The decision below is correct. This Court's decisions in *Von Raab* and *Skinner* make clear that whether drug testing is reasonable turns on the balance between the intrusion on a person's reasonable expectation of privacy and the government's interests involved. *Von Raab*, 489 U.S. at 665-666, 677; *Skinner*, 489 U.S. at 616-620, 633. In this case, the court of appeals correctly determined that the DOJ's

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and the Defense Department. Written inquires are made to former employers, references, schools, and state and local law enforcement agencies. Agencies have discretion to ask OPM to conduct a more exfensive investigation, but OPM does not require it, and further investigation is not common. Before conducting a NACI, OPM typically asks the applicant for a non-sensitive position to complete a Standard Form (SF) 85 (Questionnaire for Non-Sensitive Positions). In contrast to the SF-86 filled out by petitioner, Pet. App. 10a-12a, the SF-85 does not ask the applicant about his membership in organizations; the foreign countries he has visited; the names of his immediate relatives and acquaintances; prior convictions, charges filed, and arrests; bankruptcies and debt judgments; nervous breakdowns and treatment for a mental condition. The SF-85 also does not require the applicant to release his income tax returns, while DOJ applicants must do so. Pet. App. 12a.

The SF-85 does ask for information on past illegal drug use, but only during the past year, instead of the past five years, as required by SF-86. Similarly, the SF-85 asks about residences and jobs for the past five years, while the SF-86 covers the last 15 years.

legitimate governmental interests outweighed an attorney-applicant's legitimate privacy interests.

A job applicant enjoys a lesser expectation of privacy than an incumbent. Applicants understand that they are strangers to a prospective employer, who must investigate their employability, rather than rely on personal observation. Applicants also expect that the government will conduct an extensive background investigation, more extensive than the investigations conducted by most private employers. See Pet. App. 10a-12a. In particular, DOJ applicants know that, as part of the FBI investigation, they must reveal, under penalty of a criminal prosecution for making a false statement, whether they have used the same illegal drugs that are the subject of drug testing. *Id.* at 8a, 11a. Moreover, employment applicants can hardly expect their prospective employers to use a "reasonable suspicion" or "probable cause" standard in determining what questions to ask or what tests to require during the application process.[9] Instead, prospective employers may be expected to use a "checklist" approach: that is, if a particular subject is pertinent to the job, *every* job applicant will be asked the appropriate questions and given the appropriate tests, not merely those applicants for whom there is "reasonable suspicion" that a problem

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[9] Unless the applicant is an incumbent employee seeking a new job within the agency, as in *Von Raab*. The DOJ drug testing plan for its Offices, Boards, and Divisions (OBDs), however, does not apply to such persons. The plan defines "applicant" as "any individual not currently employed by the OBDs who is tentatively selected for employment with the OBDs or is employed in the OBDs and identified for placement in a [sensitive position designated for random testing of incumbent employees]." Pet. App. 93a-94a.

exists.[10] Finally, applicants for any job must expect that drug use in, and by members of, the workplace is a matter of concern to a potential employer, particularly at DOJ. Medical tests are frequently required of applicants for public as well as private employment. Also, as the court of appeals recognized, a drug test that is administered in a manner respecting privacy is similar to the tests given as part of a typical physical examination required by many prospective employers. Pet. App. 8a. In sum, when a drug test is administered in a courteous and professional manner, following procedures that are typical of medical examinations, the test falls well within the reasonable expectations of a job applicant.

An employer also has no prior opportunity to observe an applicant in the workplace. Pet. App. 16a. A drug test is part of the process that helps the prospective employer overcome this lack of knowledge. By contrast, an incumbent employee is not a stranger, and his employer should not need a test to know whether he is a good employee. In addition, empirical studies reveal "an extremely high correlation" between drug use and employment difficulties. Pet. App. 15a-16a. For incumbent employees who do not occupy a safety- or security-sensitive position, an employer can wait until a problem is observable in the workplace before taking steps. But such a procedure

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[10] For example, an applicant for an airline pilot's job would expect to undergo tests measuring his cardiovascular functioning, regardless of whether there is anything in his history, habits, or personal appearance that gave rise to reasonable suspicion that he has a heart problem. In fact, FAA regulations require airline pilots to have a first-class medical certificate; applicants for such a certificate over age 35 must take an electrocardiographic examination. 14 C.F.R. 61.151, 67.13(e).

makes no sense for applicants, and no employer designs its employment application process on the premise that potential areas of concern may be ignored because a person can later be fired if problems surface. In sum, a reasonable suspicion requirement may be a reasonable standard for incumbents, but it is an altogether impractical standard for applicants. Pet. App. 16a-18a.[11]

3. Relying heavily on the dissent below, petitioner claims that the court of appeals erred in failing to require a "nexus" between the injury that could stem from an employee's drug use and the specific job at issue. That argument, however, is misdirected.

In cases involving the suspicionless drug testing of incumbent employees, the courts have considered whether there is a "nexus" between the particular job at issue and the harm that a job-holder using drugs could cause in determining whether suspicionless drug testing is "reasonable" for Fourth Amend-

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[11] Judge Henderson erred in concluding that the FBI background investigation enables the government to have as complete a picture of an applicant as it has of incumbent employees; in fact, FBI background investigations can and have missed problems that surfaced only after employment began, as the majority below noted. Pet. App. 24a-26a. The Fourth Amendment does not require the government to "hire now, fire later." For the same reason, Judge Henderson erred in believing that drug testing should be subject to the same limitations for applicants as for incumbents because an applicant's drug use does not harm an employer until the applicant is hired. Pet. App. 21a-22a. An employer can observe an incumbent's on-the-job performance, but not an applicant's. Drug testing is a reasonable means of overcoming an employer's lack of information. While the potential harm from drug use is the same for applicants and incumbents, an employer has an alternative way of discovering drug use by incumbents that is not available for applicants.

ment purposes. An applicant, however, is not in the same position as an incumbent, since an employer has no opportunity to observe the applicant at work before the hiring decision is made. That fact therefore alters the total mix of facts that comprise the balance under *Von Raab*. But the court of appeals did identify a similar type of "nexus" here: empirical studies showing "an extremely high correlation between a positive result in a pre-employment drug test and subsequent employment problems" and the DOJ's concern with the effect of drug use by lawyers on the DOJ's credibility as the nation's principal law enforcement agency. Pet. App. 14a, 16a. To be sure, that nexus is not sufficient to justify testing all incumbent employees, since an employer can be required to observe the employee on the job to determine whether he uses illegal drugs (except in those instances in which "a single slip-up * * * may have irremediable consequences" before the employer notices a problem, *id.* at 21a (quoting *Harmon*, 878 F.2d at 491)). But as explained above, an employer has no prior opportunity directly to discern whether a job applicant has a drug problem.[12]

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[12] Petitioner claims that the decision below conflicts with *Rutan* v. *Republican Party*, 110 S. Ct. 2729 (1990). *Rutan* held that the First Amendment limits patronage-based hiring and discharge decisions, without distinguishing between them. Relying on *Rutan*, petitioner maintains that the court below erred in distinguishing between incumbents and applicants for purposes of the Fourth Amendment. Pet. 13-14. That claim lacks merit. To begin with, *Rutan* did not reject the statement in *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 282-283 (1986) (plurality opinion), that not being hired (or promoted) is less burdensome than being discharged. 110 S. Ct. at 2739. In addition, party affiliation is not a disqualification for any position at DOJ, but drug use is. Thus, the issue is how DOJ can determine whether that disqualifica-

Petitioner claims that the court of appeals erred by relying on the drug testing policies followed by private employers, since the Fourth Amendment does not govern their conduct. Pet. 16-18. But in this context the government is not acting in a law enforcement capacity, but as an employer, see *O'Connor* v. *Ortega*, 480 U.S. 709, 719-726 (1987) (plurality opinion), so the practices followed by private employers are relevant to an applicant's privacy expectations. Social conventions inform the determination whether an individual's subjective expectation of privacy is one that society is prepared to endorse as "reasonable," see *Minnesota* v. *Olson*, 110 S. Ct. 1684, 1689-1690 (1990) (customs and social conventions establish that an overnight guest has a reasonable expectation of privacy), so there is no reason to exclude such information from the drug testing context. It would be unrealistic to assume that society has two entirely different sets of expectations for the hiring practices of public and private employers.

Finally, petitioner criticizes the court of appeals for adverting to the fact that a DOJ applicant has advance notice of the testing requirement as well as the date of the actual test. Petitioner contends that advance notice cannot validate what would otherwise be an unconstitutional search. Pet. 18-19. The court of appeals, however, considered advance notice merely as "one of the factors" relevant to the degree of the intrusion on privacy. Pet. App. 9a (quoting *National Federation of Federal Employees* v. *Weinberger*, 818

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tion is present in the case of an applicant. *Rutan* did not modify the Fourth Amendment balancing test in *Von Raab* and *Skinner* that is used to determine whether drug testing is a reasonable means of making the inquiry. The difference between incumbents and applicants noted in *Wygant* is a legitimate factor to consider in that balance.

F.2d 935, 943 (D.C. Cir. 1987)). In this respect, the court followed *Von Raab*, which also cited advance notice of a drug test as a factor "reducing to a minimum any 'unsettling show of authority' * * * that may be associated with unexpected intrusions on privacy." 489 U.S. at 672 n.2. The decision below is therefore fully consistent with *Von Raab*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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